IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

No. 1126

GOLDBLATT BROS., INC., A CORPORATION,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

CITATIONS.

Cases.

Statute.

Other Authorities.

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GOLDBLATT BROS., INC. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 29, 1945 reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and remanding the case to that Court for further proceedings in accordance with the opinion of the Circuit Court of Appeals.

Opinions Below.

The opinion of the District Court (R. 268-278) is reported in 56 F. Supp. 255. The opinion of the Circuit Court of Appeals (R. 305-310) is reported in 152 F. (2d) 475.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 29, 1945 (R. 305). A petition for rehearing was denied on January 25, 1946 (R. 312). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Are all of petitioner's employees at its State Street store exempt from the provisions of the Fair Labor Standards Act of 1938 in that they are engaged in a retail establishment, the greater part of whose selling is in intrastate commerce?

2. Are all of petitioner's employees, including those in its segregated warehouses and bakery and in the central offices and drapery shop of its State Street store, exempt from the provisions of the Fair Labor Standards Act in that all of them are engaged in a local retailing capacity, as those terms are defined and delimited by the Administrator, pursuant to Section 13(a)(1) of the Act?

Statute Involved.

Pertinent provisions of the Fair Labor Standards Act of 1938 are set forth in the Appendix, page 23.

Statement.

This action was originally instituted in April, 1940 by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act (Act. of 1938, c. 676, 52 Stat. 1060, 29 U.S.C., sec. 201 *et seq.*), hereinafter referred to as the Act, to restrain the petitioner from violating various provisions of the Act. When first tried, the District Court of its own motion, at the close of the Administrator's affirmative case, entered a judgment dismissing the complaint on the ground that the Administrator had failed to prove that petitioner, or any of its employees, were "engaged in commerce or in the production of goods for commerce" within the meaning of the Act. The opinion of the District Court is reported in 39 F. Supp. 701. Upon appeal the Circuit Court of Appeals on June 25, 1942 reversed in part the District Court's decision on the ground that although some of the activities which the Administrator claimed were covered by the Act did not constitute interstate commerce, other functions performed by petitioner's employees did. The case was remanded "for such findings as ought to be made and such judgment as should be entered after the evidence has been heard" without prejudice to petitioner's "right to prove any of the statutory exemptions". The opinion of the Circuit Court of Appeals on the first appeal is reported in 128 F. (2d) 778.

The Administrator's application for certiorari was denied. (318 U.S. 757, 87 L. ed. 1130, 63 S. Ct. 528.) Subsequent to the denial of certiorari, the Administrator filed a petition for rehearing with the Circuit Court of Appeals. The petition was denied on May 11, 1943. The case was then tried by the District Court upon the remandment of the Circuit Court of Appeals.

At the conclusion of the trial after remandment, the District Court denied the Administrator's request for an injunction and dismissed the complaint on the ground that all of petitioner's "employees, including employees in the warehouses, bakery and executive offices, are engaged in a retail establishment" within the meaning of Section 13(a)(2) (R. 287, Conclusion of Law V) [1], and that all of petitioner's employees are employed in a "local retailing capacity" within the meaning of Section 13(a)(1) (R. 287, Conclusion of Law VI). The second opinion of the District Court (R. 268) is reported in 56 F. Supp. 255.

Upon appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of the District Court was reversed and the cause remanded for further proceedings. The second opinion of the Court of Appeals (R. 305-310) is reported at 152 F. (2d) 475.

The petitioner is an Illinois corporation owning and operating a chain of retail stores in the Chicago metropolitan area.[2] Eight department stores and one drug store are located in Chicago, one store is located in Joliet, Illinois, one in Hammond, Indiana and one in Gary, Indiana.[3] (R. 278.) All of the stores sell at retail the innumerable variety of items customarily found in the modern department stores, including food products, candy, drugs, toys, jewelry, liquor, dry goods, apparel, household furnishings, furniture, hardware and automobile accessories. (R. 279.)

1. Unless otherwise indicated, the record references are to the proceedings at the second trial. The designation "R. (1)" will be used to refer to the record of the proceedings on the first trial.

2. The company employs approximately 7500 people. Its gross sales at retail for the fiscal year ending January 31, 1943 were approximately $51,000,000. (R. 77.)

3. Petitioner also operates as a separate and distinct division of its business, stores in South Bend, Indiana, Milwaukee, Wisconsin and Buffalo, New York. These stores are operated completely separate and apart from the petitioner's stores located in the Chicago metropolitan area. (R. 32-33, 36, 220, 261.) These stores do not handle furniture or hard lines. They have entirely different merchandising policies, have their own buying organization, do their own advertising and have their own warehousing facilities. (R. 18, 222, 282-283.)

As an essential part of its retail operations in the Chicago metropolitan area, the petitioner operates five warehouses located in various sections of Chicago.[4] All of these warehouses are geographically and physically separate from any of the stores and are used by the petitioner to perform the usual receiving, handling, storing and distributive functions of a retail merchandising enterprise. Most of the goods received in these warehouses are delivered to the stores and, upon sale, to the consumer. However, certain kinds of goods, such as furniture, are generally sold from sample on the floor and delivered directly from the warehouses to the customers. In addition, various other kinds of service operations customarily performed by retail enterprises originate from and are carried on out of these warehouses. (R. 72.)

A substantial majority of the goods received in these warehouses originates from out-of-state sources. (R. 72, 73.) During petitioner's fiscal year, February 1, 1939 to January 31, 1940, in excess of $5,000,000 worth of merchandise was shipped from the company's warehouses to the stores in Indiana. (R.(1) 549-550.)

At the 14th Street warehouse, in addition to warehousing functions, petitioner operates a comforter workshop for the making of quilts and comforters for its retail stores. Approximately $70,000 worth of quilts are produced annually, about 20% of which are sent to the Hammond and Gary, Indiana stores. (R. 281.)

Petitioner also operates a warehouse and bakery located in Chicago which produced approximately $520,000 worth of goods for the fiscal year ending January 31, 1943, approximately 17% of which were sent to the Indiana stores.

4. The locations of the warehouses are set forth in Finding 3. (R. 279.) They will be referred to as the Wentworth, Iron, 63rd Street, 14th Street and South Water warehouses. These warehouses have replaced the warehouses which the petitioner operated at 3932 South Wentworth Avenue, 3746 South Loomis Avenue and 1927 West Pershing Road. (R. (1) 3.)

There is a small retail store in this bakery with total daily sales of approximately $40 (R. 258).

Among the stores operated by the petitioner is one located at 333 South State Street, in the heart of downtown Chicago. Adjoining this store there are two inter-connected buildings which are almost entirely devoted to non-selling activities of the State Street store. (R. 282.) These two buildings may be described as the State Street warehouse. This warehouse is connected with the selling premises on State Street by two over-head and one underground passageways. (R. 279-282.) The entire State Street premises, including the warehouse premises, are heated by a common heating plant. (R. 235.) The evidence does not disclose any access to the State Street warehouse except through the selling premises of the State Street store.

When the State Street store was acquired in 1936 the petitioner's executive, administrative, office and buying employees were transferred from one of the petitioner's warehouses to the upper floors of the State Street store. In the winter of 1940, about two years after the adoption of the Act, these employees were transferred from the State Street store to the Wolcott warehouse. (R. (1) 348.) On March 11, 1943 the Secretary of War, acting pursuant to the provisions of the Second War Powers Act, 1942 (Public Law 507—77th Congress) procured an order of the District Court of the United States, Northern District of Illinois, Eastern Division, appropriating the petitioner's warehouses at 3932 South Wolcott Avenue and 1927 West Pershing Road. (R. 69.) Thereafter petitioner transferred and reorganized its warehousing operations.[5]

As part of the reorganization, the executive, administrative, office and buying personnel of the company were

5. The company's present warehouses are known as the Wentworth, Iron, 63rd Street, 14th Street and South Water warehouses. The company's warehouse and bakery was transferred to 2608 Lexington Avenue, Chicago, Illinois. (R. 279.)

transferred back to the ninth and tenth floors of the State Street store. (R. 23, 283.) A large number of other employees on these floors have duties devoted exclusively to the State Street store. (R. 42, 234.) The art, advertising and engraving employees who work on the tenth floor of the State Street store were found not to be in interstate commerce by the Circuit Court of Appeals even though their work is used in connection with both the Illinois and Indiana stores. (*Walling* v. *Goldblatt*, 128 F. (2d) 778, 784.) [6]

In the original complaint filed in this cause on April 16, 1940, the Administrator raised no issue of coverage as to any of the employees working in the State Street store or warehouse. (R.(1) 2-7.) In the amended complaint (R. 2-6) filed on January 12, 1944, nearly four years after the commencement of this litigation, the Administrator raised the issue for the first time by general allegations which established a basis in the pleadings for the contention urged by the Administrator that the petitioner's employees in the State Street store who perform services for the entire enterprise are not exempt under the retailing exemptions of the Act. (R. 291.)

All of petitioner's activities and operations, including processing, are typically and customarily performed by retailers, either in their stores or in segregated non-selling premises, as the convenience and efficient conduct of their business may require. (R. 182-184, 187-190, 193-196, 200-201, 203-204.) Practically all of the activities carried on at petitioner's warehouses and at its bakery were at one time or another carried on, or are to some extent still being carried on, at petitioner's retail stores. (R. 47, 119-121, 218.) All of the goods processed by the petitioner are

6. Certiorari denied. 318 U. S. 757, 87 L. ed. 1130, 63 S. Ct. 528. Subsequent to the denial of certiorari, the Administrator took the unusual step of filing a Petition for Rehearing in the Circuit Court of Appeals. The Petition was denied on May 11, 1943.

made for sale in its retail stores to petitioner's own customers for their consumption. (R. 73-75.) Among the activities conducted at or from the warehouses there are included furniture finishing, servicing and installing of radios, refrigerators and the like, and assembling and preparation for delivery of goods direct to customers. The Administrator concedes that at least some of these are exempt activities. (R. 162.)

The petitioner's business is a completely integrated one and is organized into three functional divisions: control, merchandising and operations. (R. 219.) The head of the control division is Morris Goldblatt of the merchandising division, Nathan Goldblatt, and of the operations division, Samuel Scharfman. These divisional heads, together with numerous subordinates, maintain their offices at the State Street store. The control division has charge of all matters pertaining to accounting and finance. The merchandising division has charge of all purchases of merchandising and of sales promotion. The operations division has charge of all other aspects of the business. (R. 39, 46, 219-220.) These three functional divisions have complete and final authority and management over petitioner's business in its every detail throughout its stores and warehouses. (R. 18, 26, 30, 39, 41-42.) All units of the company in the Chicago metropolitan area are connected by a central telephone exchange which makes direct immediate communication available at all times. (R.(1) 159, R. 134, 276.) Merchandise is frequently transferred from store to store (R. 134). Furniture, as well as other items of merchandise, are sold from samples on the floor and delivered directly from the warehouses to petitioner's customers. On occasion merchandise is sold at one store and delivered from the inventory of another. (R. 27, 49, 235.) Employees are frequently transferred from store to store, from warehouse to store, and from store to ware-

house. (R. 27, 37, 42, 49-50, 113-115, 225-230, 235-236, 243-244.) Employees commonly work in both the stores and the warehouses. (R. 50-51, 119, 227-230.)

The warehouses, the bakery, the drapery shop and the central offices make no charge for any of the services or functions performed. (R. 57, 84.) The only earnings of the company are derived from retail sales to consumers made by the stores. (R. 43.)

A comparison of the wage rates in every job classification in the petitioner's warehouses and central offices as of March 9, 1940 and as of February 19, 1944 discloses that each employee, as of February 19, 1944, was earning from 55% to 182% more than on March 9, 1940, and that the work week in every instance had been reduced from two to four hours per week. (R. 255-256.)

All of the employees whose labor standards are at issue in this litigation are employed in units of the petitioner's business, selling or non-selling, which are located in the Chicago metropolitan area. These include the following: the warehouses at 3913 South Wentworth Avenue, 3716 South Iron Street, 14th and Indiana, and 201 East 63rd Street; the bakery at 2608 West Lexington Avenue; the fruit and vegetable market at 155 South Water Market; the employees in the central offices of the company in the State Street store, and the employees in the drapery shop in the State Street store.

Reasons For Granting The Writ.

I.

The present case presents in sharp focus the question whether the exemption granted by the Congress in Section 13(a)(2) of the Fair Labor Standards Act of 1938 is to be denied retailers with respect to employees whose duties

are essentially and characteristically retail in nature and which are performed on the premises of a retail store for the benefit of a chain of retail stores. The question is not only one of paramount importance in the administration of the Fair Labor Standards Act of 1938, but will directly determine the liability for back wages of retailers throughout the country—a liability which can be conservatively estimated at hundreds of millions of dollars.

The Circuit Court of Appeals felt "impelled", by virtue of this Court's decision in *Walling* v. *A. H. Phillips, Inc.* 65 S. Ct. 807, 89 L. ed. 705, 324 U.S. 490 to hold that petitioner's employees in its central office and in its drapery shop at its State Street premises were not within the 13 (a)(2) exemption. (152 F. (2d) 475, 478.)

It is submitted that there is no parallel in the *Phillips* case with the situation presented by the petitioner's central offices and drapery shop [7] in its State Street premises.

The *Phillips* case dealt with forty-nine retail stores and a physically segregated warehouse and office building in which there were no retail sales of any kind. The con-

7. The fact that some or all of the employees are engaged in or producing goods for commerce has no bearing. The 13(a)(2) exemption is applicable to all employees of a retail establishment, providing the greater part of the selling of the establishment is in intrastate commerce. (Sec. 13(a)(2) of the Fair Labor Standards Act of 1938. Act of 1938. Chap. 676, 52 Stat. 1060, 29 U. S. C. Sec. 201, *et seq.*) The point is that in an admittedly retail establishment, 100% of the goods could be received in interstate commerce and as much as 49.99% plus could be sold in interstate commerce without affecting the exemption of all employees of the retail establishment. Furthermore, an individual employee of a retail establishment could conceivably devote 100% of his time to interstate activity and he would still be exempt, assuming that the greater part of the sales of the establishment were in intrastate commerce. (Footnote 2, page 1 of Interpretative Bulletin No. 6, "Retail and Service Establishments" issued by the Administrator.) In the case at bar, the Administrator concedes, and so stipulated, that at least 90% of the sales of the petitioner are in intrastate commerce. (R. 77.) The Court's attention is called to the fact that for the purpose of the application of the exemption, no distinction is made as to whether the employees for whom the exemption is claimed are engaged in commerce or producing goods for commerce. This is conceded by the Administrator: "Processing incidental to retail selling ordinarily will not alter the retail character of the establishment and defeat the exemption." (Par. 17, page 5 of Administrator's Interpretative Bulletin No. 6.)

clusion of the Circuit Court of Appeals places a construction upon the 13(a)(2) exemption which creates the conception of the petitioner operating at its State Street store three establishments in one distinct physical place of business—a retail establishment, a central office establishment and a drapery shop establishment. Not only is any such interpretation barred by any reasonable definition of the words "retail establishment", but the *Phillips* case makes clear that each physical place of business shall be treated as a single establishment.[8]

Moreover, the petitioner respectfully submits that the Court should take significant note that *for a long period of time the Administrator concurred in petitioner's view that all employees of the State Street store, regardless of what they were doing, were exempt under the retail establishment exemption.*

At the time the Administrator commenced this suit, on April 16, 1940, petitioner's central offices were located in the State Street store and the Administrator did not contend that any employees in the State Street store were covered by the Act. It was not until the winter of 1940, about two years after the adoption of the Act and several months after the commencement of the suit, that petitioner's office employees were transferred from the State Street store to Wolcott. (R.(1) 108, 348.) In the original complaint (R.(1) 2-7) the Administrator raised an issue as to coverage with respect only to petitioner's warehouse employees. Not until the filing of an amended complaint

8. "• • • if, as we believe, Congress used the word 'establishment' as it is commonly used in business and in government—*as meaning a distinct physical place of business*—petitioner's enterprise is composed of 49 retail establishments and a single wholesale establishment." (Italics ours.) *Walling* v. *A. H. Phillips, Inc.*, 65 S. Ct. 807. This statement of the gravamen of the decision is underlined by a footnote which points out that "the term 'establishment' was used in the sense of physical place of business by many census reports, business analyses, administrative regulations and state taxing and regulatory statutes. As applied to chain store systems 'establishment' thus described each unit in the chain."

on January 12, 1944 (R. 2-7), *nearly four years after the filing of this suit,* was the petitioner given any intimation that the Administrator would contend that any of its State Street employees were excluded from the retail establishment exemption.

Finally, excluding the central office and drapery shop employees from the scope of the retail establishment exemption is completely unrealistic and fantastically unreasonable. The activities of these employees are completely integrated and surrounded by the activities of the other employees at the State Street store, who are admittedly exempt, and all of the employees of the State Street store, regardless of their duties, work alongside of and with each other.

To climax the situation, we remind the Court that petitioner's art, advertising and engraving employees who work on the tenth floor of the State Street store and who perform services for the entire chain, including the stores both in Illinois and Indiana, were found not to be in interstate commerce by the Circuit Court of Appeals, and that a petition for certiorari as to that judgment was denied by this Court. (318 U.S. 757, 87 L. ed. 1130, 63 S. Ct. 528.)

II.

The second question presented by this petition brings before this Court for the first time the application and construction of the local retailing capacity exemption as provided by Section 13(a)(1) of the Act.[9] The Circuit Court of Appeals, without analysis, and without other authority, held that this exemption was not applicable to petitioner's employees on the authority of the *Phillips*

9. Section 13(a)(1) of the Act provides that wage and hour standards of the Act shall not apply to "any employee employed in a bona fide • • • local retailing capacity • • • (as such terms are defined and delimited by the regulations of the Administrator)."

case. However, the *Phillips* case was not in anywise concerned with the local retailing capacity exemption. It was not in issue in that case and there were no comments by this Court with reference to the Section 13(a)(1) exemption in its opinion.

Petitioner's contention that all of its employees, including those in its segregated warehouses and bakery and in the central offices and drapery shop of its State Street store are exempt from the provisions of the Act in that all of them are engaged in a local retailing capacity, is predicated upon the very definition given the statutory terms by the Administrator.[10]

It is undisputed that 90% of the sales of the petitioner are in intrastate commerce. (R. 77.) The Administrator has made no claim that any of petitioner's employees is excluded from the exemption because of any interstate retail sales or work incidental thereto. There is not a single employee of the company, as shown by the undisputed evidence, who is not engaged in performing duties which are traditionally and customarily performed by retailers and which are not only immediately incidental to, but indispensably a part of making petitioner's retail sales.

In the first place, a consideration of the history of petitioner's own business discloses how typically and characteristically retail are all of the activities carried on by

10. The Administrator has issued under Title 29, Labor, Chapter 5, Wage and Hour Division, Part 541, Section 541.4 the following regulations defining these terms:

"The term 'employee employed in a bona fide • • • local retailing capacity' in Section 13(a)(1) of the Act shall mean any employee

(a) who customarily and regularly is engaged in

(1) making retail sales the greater part of which are in intrastate commerce, or

(2) performing work immediately *incidental* thereto, such as the wrapping or delivery of packages, and

(b) whose hours of work of the same nature as that performed by non-exempt employees do not exceed twenty per cent of the number of hours worked in the workweek by such nonexempt employees."

petitioner. The business was founded in 1914 at 1617 West Chicago Avenue, Chicago, Illinois, an outlying location. The store had a frontage of 22 feet and a depth of 65 feet. (R. 217.) In the next year the space was doubled and the company started to make drapes. In 1916 the store was again enlarged, a restaurant was installed, and the company began making bread and bakery goods. In 1918 or 1919 the company started making quilts. (R. 218.) Thus, it can be seen that the business, from its smallest beginnings, when it was, in fact, a little corner store, took on the outlines and basic characteristics which have remained to the present day.

It was not until 1928 that the enterprise began to add additional stores and finally, because of the limitations of space and for the purpose of convenience and efficient operation of the business, some of the company's activities were transferred to warehouses. (R. 218.) [11] Today the petitioner's business, although of substantial size and consisting of several selling and non-selling physically segregated units[12] located in two states, is all embraced within the Chicago metropolitan area[13] and is conducted as a highly integrated enterprise.[14]

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11. The comforter shop was at various times located at the Chicago Avenue store, the 26th Street store and the Hammond, Indiana store, and at all times made comforters for all the stores in the chain. (R. 120-121.)

12. There is not the slightest intimation, either in the statute or in the definition of the exemption by the Administrator, that the local retailing exemption should be withheld because of the bigness of the retail business involved or because it may consist of multiple units. The Administrator concedes that thousands of petitioner's employees, such as sales personnel, service employees installing and servicing electrical equipment, gas heaters and radios and employees engaged in the wrapping and delivery of packages, are engaged in a local retailing capacity, as that term is defined and delimited by the Administrator.

13. All of the stores in Chicago and Joliet, Illinois and those in Hammond and Gary, Indiana, are connected by the petitioner's own central telephone exchange with the various warehouses and the bakery. (R. 134.) The Indiana stores are closer to some of the Chicago stores than some of the Chicago stores are to each other or to the Joliet, Illinois store. (R. 223.)

14. As the learned District Judge said in his opinion (R. 276):

"The defendant has completely centralized and unified management which stems from its general offices located on the upper floors of its

As the Administrator himself admits in his Interpretative Bulletin No. 6 on retail establishments (Par. 36, page 11):

> "The large department store normally is a complicated enterprise engaged in retail selling. It carries a wide variety of lines of merchandise which are ordinarily segregated or departmentalized not only as to location within the store, but also as to operation and records."

In Paragraph 17 on Page 5 of Interpretative Bulletin No. 6, the Administrator says:

> "Processing incidental to retail selling ordinarily will not alter the retail character of the establishment and defeat the exemption." [15]

We earnestly believe that the Administrator has taken a thoroughly untenable position on the local retailing exemption. We submit that the exemption would have been applicable to every single employee in 1916 and that it is equally applicable to every single employee in 1945.

In denying the applicability of the local retailing exemption to *some* of petitioner's employees in petitioner's warehouses and bakery and to petitioner's employees in the State Street drapery shop and central offices, the Administrator is in effect saying: "True, you are engaged in performing services in connection with retail sales, 90%

State Street store. No internal sales of any kind are made. Merchandise is merely transferred and allocated among the various retail stores as convenience and efficient operation of the business requires. Only one set of books is kept for the entire enterprise and all units of the business are connected by one internal telephone system. Employees are engaged in essential retail activities which while covering parts of two states, are all located within the metropolitan area of Chicago * * *."

The record discloses that employees not only work in both the stores and the warehouses at the same time (R. 50-51, 119, 227, 230), but are continually transferred from store to store, from warehouse to store and from store to warehouse. (R. 27, 37, 42, 49-50, 113-115, 225-230, 235-236, 243-244.) Merchandise is transferred from store to store (R. 134) and at times is sold by one store and delivered from the inventory of another. (R. 27, 49, 235.)

15. All goods processed by petitioner are only sold in petitioner's retail stores, for retail consumption. (R. 73-75.)

of which are local and intrastate in character, but your services are not immediately incidental to such sales." With the greatest of restraint, we reply that this simply does not make sense.[16] As the Trial Judge stated in his opinion:

> "All of defendant's employees are engaged either in making retail sales or in performing duties which are customarily performed by retailers and which are not only incidental to but an indispensable part of the making of defendant's retail sales." (R. 277.)

The essence of the matter is that petitioner could make no local retail sales unless it bought the merchandise, handled it, stored it, serviced it and delivered it. The impracticality of the Administrator's position is aptly illustrated by consideration of the Iron Street or furniture warehouse. We quote from the stipulation of the parties:

> "All furniture sold by the stores is delivered from Iron. All furniture to be delivered to Illinois customers, regardless of whether the sale was made by

16. "'It (the Fair Labor Standards Act of 1938) is a penal statute, carrying with it severe penalties in event of the conviction for a willful violation. In addition, it carries with it, in the form of liquidated damages and attorney's fee, an exaction in the nature of a civil penalty, recoverable by employees in a case where it is probably not necessary to show that the failure to comply with the provisions of the law was either intentional or willful. Because of the width of the coverage of the Act, the penalties that flow from its unobservance, and the fact that it requires obedience from so many people unlearned in the law, it is highly important for the Courts to try to discern whether there is not some well-defined and commonly understood course of business custom or dealing applicable to the Act and its coverage, and, if consistent with the wording and intent of the Act, to construe the Act in the light of such commonly understood custom so that 'he who runs may read.' It is believed that Congress intended to deal with employer and employee in the light of common, every-day intelligence and experience, and intended that those coming under the provisions of the Act could know if and when they were under the Act; and the Bar might likewise be able, in confidence, to advise their clients as to whether or not they were within the Act, whose benefactions have been somewhat obscured in its perplexities. It is not believed that Congress, knowing that the Act affected laymen and those unlearned in the law, designed to make the applicability of the law so enveloped in mystery, technical considerations, and fine-spun theories relating to interstate commerce and the people affected must grope in darkness and uncertainty as to whether the Act is applicable, and whether or not the heavy penalties of the law are hanging heavily over their heads.' *Gerdert* v. *Certified Poultry & Egg Co.*, 38 Fed. Supp. 964, 974, 975."

an Illinois or Indiana store, is shipped directly from Iron to the customers. All furniture to be delivered to Indiana customers, regardless of whether the sale was made by an Illinois or Indiana store, is delivered to a delivery base in Hammond and thence directly to the customers. Eighty-six per cent of the furniture shipped from Iron goes directly to Illinois customers; the remaining 14 per cent goes to defendant's Indiana delivery base and then to Indiana customers.[17]

"The defendant employs approximately 99 employees at Iron, of whom approximately two employees are engaged in receiving and unloading of furniture received from outside the State of Illinois; approximately 47 employees are engaged in the packing, loading and shipping of furniture from the said warehouse to defendant's customers.

"Approximately twenty-three employees are employed by the defendant at this warehouse in the assembling, repairing, renovating and refinishing of furniture. There are fifteen employees in this warehouse who are employed as outside service men and whose duties consist of going to the homes of the company's customers in Indiana and Illinois for the purpose of servicing or installing appliances or furniture which has been sold by the stores." (R. 71-72.)

Here the bulk of the duties performed by the employees has to do with either storing the goods until sold or handling the goods *after* the local retail sale. We submit that nothing could be clearer than that these employees, as well as all other employees here in issue, are engaged in performing duties which are not only immediately incidental but which are absolutely indispensable to the making of the retail sale.

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17. Prior to regulations imposed by the Office of Defense Transportation, all deliveries, including those for Indiana customers, were made direct from the furniture warehouse. (R. 59.) Shipments direct to customers are also made from the Wentworth warehouse (R. 58, 89), and, until curtailed by the Office of Defense Transportation (R. 58), large quantities of groceries were shipped direct to customers from the grocery warehouse, originally Wolcott and now 63rd. In 1940 there were 170,000 such orders, aggregating a volume of approximately $606,000.00. (R.(1) 183.)

In frankly admitting that certain of the employees in petitioner's warehouses are exempt within the meaning of the local retailing exemption, the Administrator underlines not only the inconsistency of his position, but the practical impossibility of applying the exemption to some warehouse employees and not to others, all of whom perform equally vital and immediate duties in connection with the making of local retail sales.[18]

A comparison of the petitioner's business with various retail enterprises, large and small, in the Chicago area conclusively demonstrates that there is nothing uniquely different or special about the petitioner's local retailing activities. For the convenience of the Court we summarize this testimony as follows:

1. Elmer T. Stevens, the President of Charles A. Stevens and Company, testified that his company conducts its business at a single location—19-25 North State Street, Chicago, Illinois—in a building consisting of seven floors and two basements. Seven floors are devoted to selling and the remaining space is used for offices, alteration rooms, supply rooms, receiving rooms, stock rooms and general storage facilities. The movement of goods through the stockrooms depends upon the nature of the goods, some move rapidly, some move slowly. The company processes hats, fur coats, wedding veils, bakery goods and incidental merchandise. Most of the company's goods is purchased from manufacturers. (R. 182-184.)

2. Henry D. Brohm, Vice-President and Comptroller of the Wieboldt Stores, testified that his company operates six department stores, four of which are located in Chicago, one in Oak Park, and one in Evanston. Wieboldt's also has one segregated warehouse, and

18. Another example is the case of employees engaged in shoe repairing, some of whom are located in the stores and others in the warehouses. Under the Administrator's interpretation, some are subject to the exemption, others are not. All of the employees in the shoe department, however, whether in the warehouses or in the stores, are covered by a single collective bargaining agreement. (R. 231.)

central stocks are located in various stores for the use of all stores. The company cuts and sews carpeting and cuts and edges linoleum in its warehouse for all stores. In its Ashland-Monroe Street store garments are altered, repaired, cleaned and stored for all stores. Bakery goods are made in each store, except that the Ashland-Monroe Street store makes the bakery goods for the Evanston store. Furniture finishing and upholstering is conducted at the warehouse for all stores. The drapery work room and the executive, accounting and credit functions of the business are carried on at the Ashland-Monroe Street store for all stores. (R. 186-190.)

3. Austin T. Graves, Assistant General Manager of Marshall Field & Co., testified that Marshall Field & Co. operates a main store in Chicago and suburban stores at Evanston, Oak Park, Lake Forest and Chicago Heights. In addition, the company maintains five segregated warehouses. The executive and merchandising offices for all stores, except the Chicago Heights store, are in the Chicago store. The bulk of the goods of the company is warehoused and handled in the stores and and warehouses, in accordance with the efficiency, economy and practicability of the particular operation. The movement of goods through the warehouse varies enormously, depending upon customer demand and inventory space. The company makes shirts, shorts, metal work, jewelry, bags, candy, ice cream, bakery goods, fur coats, hats, guns, restores old paintings, makes saddles and a variety of other items for sale in its retail stores. Some of this processing is conducted by an individual store for its own customers and, in many cases, is conducted at the State Street store for all stores. The company maintains its own buying office in New York and customarily buys direct from manufacturers. (R. 191-196.)

4. Sedgwick Ryno, Store Manager of the Fair Store, testified that the company operates two stores, one in Chicago and one in Oak Park, and a segregated warehouse where furniture is housed for both stores. The

State Street store also stocks goods for the Oak Park store. The executive, clerical and buying offices are at the State Street store. The company makes drapes, finishes furniture, alters garments, has a fur workroom, repairs jewelry and prints stationery for its own use. The company is a member of a buying syndicate in New York and buys practically everything direct from manufacturers. (R. 199-201.)

5. Edward Warnshuis, Vice-President of the Boston Store, testified that the company operates a single retail department store in downtown Chicago in a building consisting of seventeen floors. The company makes bread, bakery goods, draperies, curtains, upholsters and refinishes furniture, repairs, cleans and dyes shoes and alters furs. It has a segregated warehouse at 15th and State Streets, Chicago, Illinois, where goods are received and stored. The business and buying offices are at State and Madison Streets. The movement of goods through the warehouse "depends entirely on what the merchandise is". The company has a New York buying office and, like enterprises big and small, goods are bought direct from manufacturers. (R. 211-214.)

6. Samuel Scharfman, one of petitioner's executives, testified that, to his knowledge, comforters were made for stock and for order at the Leader Stores at 3934 Crawford Avenue, and at the Lurie Department Store. (R. 258.)

7. Edwin A. Duddy, a member of the faculty of the School of Business at the University of Chicago since 1920, teaching marketing and market research, testified that he was familiar with the typical and customary operations conducted at retail stores and that the making of drapes, bakery goods and quilts was a typical retail operation which has been described by the Department of Labor as retail processing. (R. 202-205.) Professor Duddy also testified that a warehouse owned and operated by a chain store is part of the store organization; that the chain store is classed in marketing

literature as a retail enterprise, and that retailers generally combine for the purpose of purchasing from manufacturers. (R. 209.)

The record, therefore, conclusively establishes that petitioner's activities in all of its aspects are typically and traditionally retail in character. It follows inevitably, we earnestly submit, that the performance of these activities, of which more than 90% are concerned with intrastate sales (R. 77), by petitioner's employees makes the local retailing capacity exemption applicable, as that term has been defined and delimited by the Administrator.

Conclusion.

The importance of the questions here raised cannot be exaggerated.

With reference to the retail establishment exemption, we submit that common sense, business custom, reasonable construction of the Act and the plain language of the *Phillips* case affirm that all the employees at petitioner's State Street premises, including those in the central office and drapery workshop, are exempt within the purview of the retail establishment exemption. Not the least support for this conclusion is that the Administrator did not take a contrary position until January 19, 1944, nearly four years after the filing of this suit, when the Administrator reversed his position by an amendment to the complaint. There is not a single precedent in law or in business for the three-establishments-in-one doctrine which is implicit in the opinion of the Circuit Court of Appeals.

In any event, the Court is urged to grant the writ so that a definitive opinion can be had as to the meaning and application of the local retailing capacity exemption. It is respectfully suggested that the avowed reliance by the

Circuit Court of Appeals upon the *Phillips* case, which did not involve or refer to this exemption, can only lead to further complication and confusion of the very vital problems involved unless the writ applied for is granted.

Respectfully submitted,

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